IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 444 of 2003

in

SPECIAL CIVIL APPLICATIONNo 3589 of 2002

with

CIVIL APPLICATION NO. 2294 OF 2003

For Approval and Signature:

Hon'ble ACTING CHIEF JUSTICE MR.JN BHATT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

RAMESH MOPABHAI RATHOD

Appearance:

1. LETTERS PATENT APPEAL No. 444 of 2003

MR NAGESH SOOD, ASSTT. GOVERNMENT PLEADER for Appellant No.

MR KISHOR M PAUL for Respondent No. 1

RULE SERVED for Respondent No. 1

CORAM : ACTING CHIEF JUSTICE MR.JN BHATT
and
MR.JUSTICE A.L.DAVE

Date of decision: 06/08/2003

ORAL JUDGEMENT

(Per : ACTING CHIEF JUSTICE MR.JN BHATT)

By this appeal under Clause 15 of the Letters Patent at the instance of the State of Gujarat, the challenge is against the judgement of the learned Single Judge, rendered, on 1.4.2002, in writ petition, whereby,
the petition against the award dated 19th December, 2000 in Ref. (LCR) No. 415 of 1988 came to be rejected, upholding the said award and inter-alia holding that the plea of workmen having not worked for 240 days, and that the unit of Forest Department manufacturing polythene bags is not an industry within the meaning of Section 2(j) of the Industrial Disputes Act, 1947, raised on behalf of the petitioner appellant before us, is not acceptable.

2. We have heard the learned Advocate appearing for the parties, who have taken us through the entire testimonial as well as documentary evidence during the course of submissions before us. We have also given our anxious thoughts and considerations to the proposition of law and correct interpretation of the provisions of Section 2(j) of the I.D.Act. In so far as interpretation of the proposition of law on Section 2(j) of the I.D.Act is concerned, in the light of the factual profile which is on record, it is not in controversy that the respondent workman was being employed in a manufacturing unit established by the Forest Department for the purpose of manufacture of polythene bags for self-consumption. The finding of the learned Single Judge upholding the award that in the instant case the workman can be said to have been engaged in an industry and the said work falling within the purview of Section 2(j) of the I.D.Act, is sustainable. This proposition of law is very well expounded by the Hon'ble apex Court in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa & others, reported in (1978) 2 SCC 213 and the subsequent Constitutional Bench decision rendered by the apex Court in Coir Board Ernakulam Kerala State & anr. Vs.

Indiradevai P.S & others - 2000 SCC (L&S) 120. After having taken into consideration the text and the tenor of the factual profile, the decisions and guidelines for inclusion and exclusion in the definitional provision of Section 2(j) of industry, we are satisfied with the view taken by the labour Court and confirmed by the learned Single Judge that the work of manufacturing of polythene bags of the Department of Forest of the Government of Gujarat is answering the eligibility criteria of the definition of industry. We therefore uphold the said finding and proposition.

3. In so far as the second ground of challenge is concerned, we are of the opinion, upon critical apprisal, detailed evaluation and the examination of the entire evidence on record, that the finding of the Labourt Court as affirmed by the learned Single Judge with regard to the appellant - State of Gujarat has not followed the provisions of Section 25-F of the I.D Act and therefore the termination of the respondent workman from the employment with effect from 6.7.1987 is illegal, is not at all sustainable.

4. Section 25-F reads as under:-

"25-F CONDITIONS PRECEDENT TO RETRENCHMENT OF WORKMEN - No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until --

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [or such authority as may be specified by the appropriate Government by notification in the official Gazette].

It could very well be seen that a workman engaged in any industry and who has been in continuous service for not less than one year in an employment shall not be retrenched by the said employer unless he has been served with one month's notice in writing, showing the reasons for retrenchment and until the period of such notice has expired or he has been paid wages in lieu of such notice, for the period of notice. It is also a condition precedent that service of such a workman is not terminated or such a workman has been paid the retrenchment compensation which shall be equivalent to 15 days average pay for every completed year of continuous service or any part thereof in cases of six months and such a notice has been served in a manner prescribed. In short, the termination is dependent upon the fulfilment of the aforesaid conditions and that it should not be punitive. The first requisite condition is to show that the workman has worked for a period not less than 240 days in a year. The finding of fact in this regard, with due respect to the Labour Court and the learned Single Judge, is not supported as it is not reinforced by the factual profile emerging from the record of the present case. Ordinarily, in view of the statutory power under Section 11-A of the I.D.Act, the writ Court would be slow to interfere with such a finding. However, where it is successfully pointed out and spelt out from the record that a finding is founded upon or based upon no evidence or is running counter to the weight and might of the evidence on record, it is always open to mould the relief so as to do complete justice between the parties.

5. Upon meticulous and careful screening and scanning the evidence on record, the following propositions emerge without any shadow of doubt.

(a) That the respondent workman has not been able to establish that he was engaged in a given year for a period of 240 days or more so as to attract the applicability of the provisions of Section 25-F of the I.D. Act. There is no proof on record showing 240 days working by the respondent for attracting the benevolent rigors of the provisions of Section 25F of the I.D. Act. Our attention has been drawn by the learned Advocate for the appellant to the decision of the Hon'ble apex Court, rendered in M/s. Essen Deinki Vs. Rajiv Kumar, reported in AIR 2003 SC 38, wherein it has been clearly expounded that the proof of fact of having worked for a spell of 240 days or more is on the party propounding it for the

purpose of claiming the benefit of the provisions of Section 25-F of the I.D. Act.

(b) The respondent workman has testified in his evidence Ex.13 before the Labour Court upon a reference that he came to be terminated on 6.7.1987 by the appellant State of Gujarat and the demands came to be made on 18.7.1987. Though he was a casual labourer, he was not given notice or notice pay in lieu of notice, or any retrechment compensation. At the same time he has also clearly admitted under the cross-examination that he was undergoing training for a period of one year between the period commencing from 1.7.1987 to 30.6.1988 and he was getting Rs. 100/- per month as stipend. He joined the training on 8.7.1987 while denying that he had left the job as a casual worker for the purpose of receiving training, unconcerned with the Department in which he was engaged as a labourer.

After giving our anxious consideration and thoughts, and even on the testimony of the workman, we find that the Labour Court, with due respect, has totally failed to take into consideration the factual chronics emerging from the testimony of the workman himself.

(c) Apart from that, the appellant - Government has placed reliance on the testimony of witness Vithalbhai Gigabhai Vanpariya, who was at the relevant time Range Forest Officer in the Department of Forest. He has been examined at Ex.29 by the Labour Court. It is very apparent and manifest from his testimony, which is in all probabilities not seriously examined by the Labour Court, that the respondent workman was working as a daily wager who had not completed even 100 days of working before he voluntarily left the work. It is also very clear from his evidence that workman was paid daily wages and his presence was marked. As per the muster-roll, the workman was working in the cutting machine in the factory of polythene bag and the witness has also clearly testified that the respondent workman was not terminated, but he had voluntarily deserted the work.

(d) So, it is very apparent that it has not been proved that workman had worked for 240 days and

more, but he has not even worked for more than 100 days as per the factual profile emerging from the record of the present case. He voluntarily left service on 6.7.1987 and joined the training which was outside the Department, and that too with a stipend of Rs. 100 per month which was for a period of one year commencing from 1.7.1987 to 30.6.1988.

The service record of the respondent employee which was placed at the time of hearing, clearly manifest that the responent workman had worked only for 32 days in year 1985-86, 212 days in the year 1986-87 and only 66 days in the year 1987-88.

After considering the aforesaid discussions in the light of the evidence on record, two things have emerged unquestionably.

(1) that the workman had not worked for a period of 240 days so as to attract the applicability of the provisions of Section 25-F and

(2) that his service was not terminated or that he was not discontinued from the work by the appellant employer, but he had voluntarily left the daily worker job, presumably for a better prospects as he has joined in the training for a period of one year with a stipend of 100 rupees per month.

Since there is no retrenchment, there would not arise any question of violation of the statutory provisions of Section 25-F and for that purpose, the provisions of Section 25G as well as 25-H. The retrenchment is circumscribed, subject to the statutory rigors inhibited in the provisions of Section 25-G as well as 25-H. Section 25-G provides statutory procedure for retrenchment, which is based on the celebrated doctrine of service jurisprudence last come, first go at the time of retrenchment. When retrenchment is not established, the question of applicability of the provisions of Section 25-G obviously would not come into play.

6. So is the case in so far as statutory provisions of Section 25-H of ID Act are concerned, which relate to the procedure to be followed for the purpose of reemployment of retrenched workman. So the condition precedent for the attractability or applicability of the provisions of Section 25-H is the retrenchment, if there

is no retrenchment as contemplated by the provisions of Section 25F, there would not arise the question of any violation or infraction of the provisions of Section 25-H of I.D.Act.

7. Keeping in mind the catalogue of days and events as enumerated hereinabove in the evidence of the workman as well as Range Forest Officer as a witness examined by the Department, we have no any hesitation in finding that the award of the Labour Court is running diametrically opposite to the factual proposition established, though ordinarily in exercise of power of, or jurisdiction of this Court by way of superintendence, Court cannot remain oblivious to the stark reality that there is manifest error on the record with regard to the finding of fact without any justification from the record. It is in these context that this Court can set aside or even ignore the finding of fact of an inferior Court, or a Tribunal in absence of any evidence to justify such a conclusion, not only that the facts of the case on hand unfold a chronicle of events, which stand on a higher footing than that. In that, it may be mentioned that it has been disproved that the workman was engaged for a period of 240 days or more. The view which we are inclined to take is very much reinforced by the proposition of law which is laid down in a catena of judicial pronouncements. However, we cannot resist the temptation in mentioning following to decisions in this connection, which upheld the view which we are taking.

(1) Nibaran Chandra Bag Vs. Mahendra Nath Ghughu AIR 1963 SC 1895 &
(2) Mani Narain Daruwala Vs. Firoz - AIR 1999 SC 1494

8. After having taken into account the facts and circumstances emerging from the record of the case on hand, we are satisfied that in so far as the first part of the finding with regard to the nature of the work whether it tantamount to an industry or not, is rightly held by the Labour Court and rightly upheld by the learned Single Judge. Whereas, the finding of the Labour Court in the award with regard to the applicability and violation of the provisions of Section 25-F and affirmation of the Ld. Single Judge is not justified in so far as it relates to the statutory definition of industries is concerned. The finding with regard to the applicability of Section 25-G as well as 25-H in the award cannot be upheld as that finding is not justified, which is not at all finding place in the impugned judgement. Apart from that, the attractability or the

applicability of Section 25-G and 25-H would be dependent on the emergence and existence of the condition precedent of retrenchment, which is absent in the present case as found by us herein before. Therefore, in our opinion, the impugned award of the Labour Court and the impugned judgement of the learned Single Judge cannot be sustained. We therefore left with no alternative but to quash and set aside and accordingly they are quashed and set aside. The appeal shall stand allowed without any order as to costs.

9. Before parting with, our attention is invited to the fact that despite interim order of this Court dated 6th May, 2003, which is based on the submission of learned Advocate for the respondent workman, thereby staying the operation of the impugned judgement of the learned Single Judge, the same is not complied with. We have passed the interim order keeping in mind the provisions of Section 17-H and subject to the fulfilment and satisfaction of the criteria laid down thereon. If the criteria laid down thereon are established, obviously the workman would be entitled to the benefit of the provisions of Section 17-B.

10. In view of the above, Civil Application also stands disposed of.

(J.N.Bhatt, Acting C.J.) (A.L.Dave, J.)

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